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**THOMAS C. CANTER**  
**EXECUTIVE DIRECTOR**

May 15, 2000



**Via Federal Express**

Office of the Secretary  
Case Control Unit  
ATTN: STB Ex Parte No. 582 (Sub No. 1)  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

**ENTERED**  
**Office of the Secretary**

**MAY 16 2000**


**Part of**  
**Public Record**

Re:     STB Ex Parte No. 582 (Sub-No. 1) –  
           Major Rail Consolidation Procedures

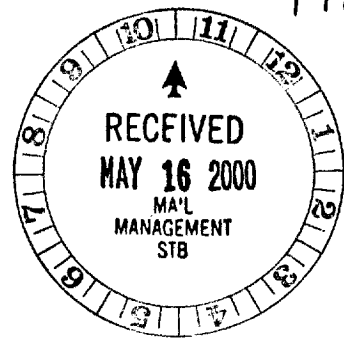
Dear Mr. Williams:

Please find enclosed an original and 25 copies and a 3.5 in. floppy diskette containing the comments of the Western Coal Transportation Association in the above referenced matter.

Very truly yours,

  
Thomas C. Canter

Enclosures



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Ex Parte No. 582 (Sub No. 1)  
*Major Rail Consolidation Procedures*

**ENTERED  
Office of the Secretary**

**MAY 16 2000**

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Public Record**

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**COMMENTS**

**Submitted By**

**THE MEMBERSHIP OF THE  
WESTERN COAL TRANSPORTATION ASSOCIATION**

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Executive Director  
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May 16, 2000

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Ex Parte No. 582**  
*Major Rail Consolidation Procedures*

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**COMMENTS**

**Submitted By**

**THE MEMBERSHIP OF THE  
WESTERN COAL TRANSPORTATION ASSOCIATION**

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**INTEREST OF THE WESTERN COAL TRANSPORTATION ASSOCIATION**

The Western Coal Transportation Association ("WCTA") is a non-profit corporation that maintains and promotes, through lawful cooperation and the exchange of ideas, the orderly and effective development of the transportation of coal originating in the states west of the Mississippi River. WCTA endeavors to serve the needs of the general public, industry, and all modes of coal transportation. WCTA members are vitally interested in reliable, efficient, and economic rail service in the United States. The organization was formed in 1973 as coal from the Powder River Basin was beginning to be delivered over long distances by rail. Educating the members regarding current and future coal transportation issues and facilitating the resolution of coal transportation problems are the primary goals of WCTA. There are currently ninety-five members with the field of membership being coal producers, coal consumers, rail product and rail service providers. Our electric utility members are organizationally and geographically diverse. They consist of municipalities, cooperatives, investor-owned utilities, and government entities, and they are located from Florida to Oregon. The coal producers provide coal for domestic electric utilities and manufacturing industries as well as coal for export via the West Coast, the Great Lakes, the

Mississippi River, and by direct rail to Mexico and Canada. The rail product and service suppliers provide virtually all of the running and electronic components, and the manufacture and repair of coal railcars used by the members that own, lease, and manage coal railcar fleets. WCTA members own or lease about 50,000 railcars and produce or consume over 500 million tons of coal annually.

Although WCTA is a shipper-based organization, we assiduously endeavor to cooperate with coal transportation providers whenever possible. Although the rail carriers are not official members of WCTA, they are active participants in our working committees that facilitate solutions to issues and challenges of vital interest to the WCTA membership and the railroads. Several WCTA initiatives arising from WCTA activities have been notably successful in improving the level of cooperation and operating efficiency in the Western U.S. The coal transportation infrastructure benefits significantly from these endeavors.

### COMMENTS

The western coal industry continues to be inextricably linked in a triangle. The first side consists of the coal producers and the rail product and service suppliers; the second side is the coal transportation suppliers; and the third side is the coal consumer who is generally the shipper of record. Coal transportation for coal originating in the western states is dominated by rail carriers and particularly so in the Powder River Basin ("PRB") with over 93% of all coal ton-miles carried by rail even when considering river barges for a segment of the coal haul. Rail transportation from the PRB represents over 300 billion ton-miles of transportation with an average haul length of slightly over 1000 miles.

The western coal industry faced a challenging two years from mid-year 1997 to mid-year 1999 in terms of the reliability of service for transportation by rail as a direct result of mismanagement and unexpected problems arising from rail merger implementation. Currently, the service levels are highly satisfactory with record cycles times for unit train railcar sets owned or leased by our members. It should be noted that arriving at the current level of service came after severe economic and operational

harm to coal shippers and coal producers directly resulting from unreliable rail service. In addition to the significant additional operating costs for producers and utilities incurred during the period of unsatisfactory service, coal shippers are still absorbing costs even today with several hundred million dollars of railcar assets procured as necessary during the period of poor cycle time performance sitting idle with little hope of economic return in the near future.

What rules and conditions should be imposed in future merger/consolidation proceedings?

WCTA offers the following comments on suggested rules and conditions for mergers/consolidations:

- **Safeguarding Rail Service.** All future merger applicants must present a detailed service integration plan. This plan needs to show clearly how the interface with both Class I and shortline railroads will be achieved and the number of employees, locomotives, and rolling stock required for interchanges and service points to operate efficiently. Further, the service integration plan must address customer communications requirements for scheduling, maintenance and track outages, and notification of capacity constraints and derailments. This plan needs to have a definable, well-documented and specific reference base service period such as the service levels during the year of normal, satisfactory operations preceding merger approval. The merger applicant will specifically guarantee the baseline service level and in the event efficiency gains are claimed in the merger application, a specified percentage of that improvement will be added to the base level of guaranteed service. The burden of proof to detail the levels of guaranteed service shall be with the merger applicant subject to rebuttal by parties of proper legal standing in the proceeding. The remedy and penalty for failure of service must be specific and effective. The remedy and penalty process could have mediation and arbitration prior to any penalty phase as agreed by the shipper and rail carrier with escalation of remedies and penalties over some reasonable time frame. In the event service levels continue at unsatisfactory levels below the guaranteed levels despite the mediation/arbitration

agreement or in the event of the need for emergency relief, the shipper would have recourse to STB oversight and an imposed remedy.

The merger applicant will be required to supply service metrics at reasonable periodicity to the shipper. The range of remedies should be quite broad to include, but would not be limited to, trackage rights from competing rail carriers, terminal or regional access, opening of gateways, contracted third party services, railcar supply, modified local operating agreements, joint operating agreements, overhead rights, reciprocal switching, and divestiture, and more.

Although the STB has taken oversight jurisdiction in past mergers, the rule for future mergers should be to automatically have STB oversight jurisdiction for five years to oversee the implementation of the service integration plan and become aware of and remedy any unforeseen anti-competitive effects arising from the merger.

- **Promoting and Enhancing Competition.** The period of shedding excess capacity or saving a financially failing carrier as a rationale for mergers is essentially over. The sense of urgency favoring mergers should now be replaced with a deliberate schedule requiring a detailed investigation of any anti-competitive effects of a merger. Specific remedies must be fashioned where competition or competitive access has been reduced for shippers by the merger. Captive shippers are a fact of rail transportation and cannot be eliminated by advancing tenuous economic theories of shipping and product alternatives. Therefore, captive shippers must be protected from any further anti-competitive effects of a merger. The burden of proof that proposed merger is pro-competitive must be on the merger applicant and should go beyond a showing of “no harm”. The “one lump” theory should be abandoned by the Board as it prevents evidence of economic harm from being properly considered in a merger proceeding. The traditional remedies of trackage rights, reciprocal switching, gateway access, terminal

access, joint use of or shared assets, and the like should continue to be imposed as required for equity or as a pro-competitive measure. Gateways under the control of the merged entity should have both physical and economic access guaranteed and no new bottlenecks should be created from a merger. All pro-competitive conditions imposed on a merger must be subject to STB oversight for five years to assure proper implementation.

- **Shortline and Regional Railroad Issues.** Coal shippers use shortline and regional rail carriers for the termination and origination and for many bridge or connecting hauls. The existing operating and marketing agreements may or may not have been negotiated with equal bargaining power. Although, WCTA does not advocate violating subsisting bilateral agreements, the Board should have merger policies that eliminate contractual barriers to interchange and switching, gateway access, supplying cars and power, proper communications and cooperative operations.
- **Downstream Effects.** Any future merger will have an effect on the operation and service of other shippers and railroads not directly involved in the merger under consideration. This is more pointed as the number of Class I railroads has decreased to single digits. Certainly, the specific effect on other carriers and customers or any contemporaneous rail carrier merger proposal should be reviewed as part of the merger proceeding. The merger applicant should present the case for the probable downstream results of the proposed merger subject to rebuttal testimony from all parties. Further, a reasonable investigation of the “end game” of consecutive mergers needs to be considered in a broad sense. However, a complete review of all possible merger combinations or permutations or a requirement for a straw man white paper for each speculative combination or permutation is not reasonable or beneficial.
- **Antitrust Considerations.** Although the antitrust laws are arguably enforceable against the railroads in their commercial dealings, the STB is the sole source of antitrust

protection regarding mergers. WCTA advocates the continuance of the jurisdiction of the STB over all aspects of a merger proceeding including antitrust and anti-competitive arrangements in merger proceedings. However, the settled body of law developed by the courts and the Department of Justice and the Federal Trade Commission applicable to other industries should be applied in future merger proceedings by the STB. This is particularly important in view of the small number of independent Class I rail competitors.

## **BACKGROUND AND DISCUSSION OF COMMENTS**

### **GENERAL**

The railroad map has changed drastically since the passage of the Staggers Act of 1980. Without recounting the specific changes, it can be fairly stated that surviving and merged rail carrier entities enjoy a stable financial and marketing environment that is greatly improved and that the Class I rail transportation industry does not suffer from overreaching and pervasive regulation. The challenge is to recognize the recent fundamental changes in the major rail transportation infrastructure and decide what future safeguards are necessary to protect the public interest.

The overarching philosophy of the comments of WCTA is that while WCTA is not opposed in any generic sense to future mergers, the STB must impose conditions and requirements on mergers that assure the merger is implemented in the public interest, with reliable service, and enhances pro-competitive access for shippers. In other words, considering that the number of Class I rail carriers has decreased to single digits, the “hurdle” requirements and burden of proof on the merger applicant for the approval and implementation of any future merger will necessarily be raised and any “pro-merger bias” in merger proceedings will be eliminated. Further, WCTA does not believe that the march toward only two transcontinental railroads is inevitable if rules for future mergers are rationally drawn and properly implemented by the STB.



Having stated that WCTA is not generically opposed to future mergers, it should be noted that WCTA will not support any proposed merger that cannot prove that it will be an end-to-end transaction with absolutely minimal two-to-one reductions in competitive access, will not result in a diminution of service for shippers nor impose “bottlenecks” on shippers, and that the merger’s provisions and conditions will enhance competition. WCTA recognizes that such transactions will be rare and the burden of proof high, but it is better than the resulting necessary pervasive regulation arising from having a transcontinental duopoly.

The development of larger rail carriers by merger has a deleterious effect on the emergence of new Class I railroads that would provide needed competition in certain commodities and regions. The competitive access of possible and known proposals for new or expanded rail service must be given consideration with conditions that will not preclude a new entrant. Similarly, a merger applicant should show why joint marketing agreements and joint operating agreements between the merging parties is not superior and more beneficial to the public interest contrasted to the actual merger considering that the results of a failed or unsatisfactory merger are very difficult to reverse.

The economics of a proposed merger must be closely and critically examined. The imprudent burden of debt on a surviving entity acquired to achieve gossamer-like efficiencies cannot be allowed. The merged entity that has overstated the efficiencies to be gained will have too great an incentive to look to the captive shipper to regain lost profit margins. Likewise, a fully developed service integration plan is critical for receiving approval. The points of interface with other carriers, labor agreements, the restoration and improvement of competitive alternatives, communications with shippers, etc. must be shown in requisite detail. Of course, the implementation of the service plan must have meaningful oversight by the STB with reasonable access by shippers and escalating remedies and penalties for failure to meet merger conditions over a sufficient length of time to assure shippers adequate and reliable service.

WCTA members are concerned, although not certain, that reduced competition by rail carriers may stifle technological progress. If the rail carriers do not see advantage in supporting technological risk and new capital for innovations in wheels, brakes, electronics, running gear, couplers, and railcar

construction and design, it may be more difficult to bring these improvements in safety, cost, and productivity to the marketplace. It is an aspect to consider in the downstream effects of mergers.

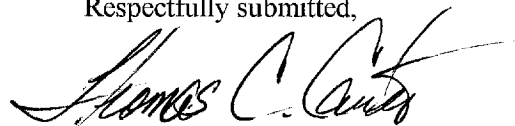
Economic issues, addressing “bottlenecks” for captive shippers, and competitive access are of great importance to WCTA members. Although it is necessary to specifically address aspects of these issues in Ex Parte 582 (Sub No. 1) as they specifically apply to merger rules, WCTA members assert that ideally these issues will be addressed or revisited more thoroughly by the STB through separate proceedings or specific rate cases. Indeed, it may be prudent and in the public interest to revisit certain terms and conditions of past mergers that are still under STB oversight authority using the new rules and guidelines for mergers. This would provide a procedure to remove certain inequities, anti-competitive results, and specific breaches of guarantees to shippers.

WCTA asserts that cross-border issues associated with rail operations should be addressed by the STB but that most economic issues should be handled under international trade agreements.

WCTA is not aware of any urgency to consummate any transcontinental merger or consolidation because of the imminent financial failure of any party or because the public interest demands a reorganization. Future proceedings should be handled with deliberation, but not unnecessarily delayed, to assure full examination of ideas and concerns.

Coal producers, coal consumers, and railroads are partners in the coal business. These partners provide a vital service to the U.S. economy by producing and utilizing the most available and reliable domestic fuel to make electricity and assuring a reliable, reasonably priced energy source for industry and consumers. The future rail infrastructure must allow these partners to enter commercial arrangements on a fair and equitable basis.

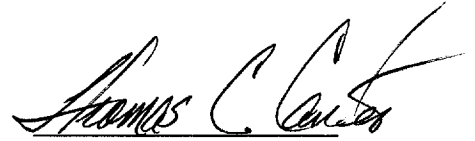
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas C. Canter", written in a cursive style.

Thomas C. Canter  
Executive Director

### **CERTIFICATE OF SERVICE**

**I certify that on the 16<sup>th</sup> day of May, 2000, I have served a copy of the foregoing on all parties of record on the Service List as modified in accordance with the Board's Rules of Practice.**

A handwritten signature in black ink, appearing to read "Thomas C. Canter", written over a horizontal line.

**Thomas C. Canter**